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Supreme Court of the United States

October Term, 1959

No.

MASSOAD ABDALLAH HIDICK,

Petitioner,

against

ORION SHIPPING AND TRADING CO. INC., PACIFIC CARGO CARRIERS CORPORATION, and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RASSNER & RASSNER,
Attorneys for Petitioner.

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ORION SHIPPING AND TRADING CO., INC., PACIFIC CARGO CARRIERS CORPORATION, and UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on the 2nd day of May, 1960.

Questions Presented

1. Whether statements taken by a shipowner, of a master, as well as other officers, in the regular course of its business, constitute admissible evidence in a personal injury action for damages predicated on a maritime tort.[1]

2. Whether testimony, under oath, by:

(a) Ship's Officers.

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[1] Title 28 U. S. C. A. 1732.

(b) Ship's Crew.

given at a Coast Guard investigation concerning a marine disaster, constitutes admissible evidence in a personal injury action for damages predicated on a maritime tort.

3. Whether Section 89 of U.S.C.A., Title 14 U.S.C.A. Section 89, which authorizes the Coast Guard to make inquiries, examination, inspections, etc., as agents of the United States, constitutes a basis for introducing in evidence the written reports of the Coast Guard obtained from:

(a) Ship's Officers.

(b) Ship's Crew.

in a personal injury action predicated on a maritime tort.

4. Whether Coast Guard records of an investigation of a marine disaster come within the provisions of Title 28 U.S.C.A., Sec. 1733.

Opinion Below

The opinion of the United States District Court for the Southern District of New York, on the Government's motion to dismiss the third-party complaint, dated November 15, 1957, is reported at 157 F. Supp. 477.

The opinion of the Court of Appeals for the Second Circuit is reported at 278 F. 2d 114.

Jurisdiction of this Court

The judgment of the Court of Appeals was entered on May 2, 1960.

The jurisdiction of this Court is invoked under Title 28 U. S. C. 1254(1).

Reasons for Granting the Writ

1. There is a conflict of authority between decision by the Court of Appeals for the Second Circuit in the case at bar, *Hidick v. Orion Shipping and Trading, etc. and*

Nadar v. *Isthmian S.S. Co.*, 187 F. 2d 538, with the decision by the Court of Appeals for the Fifth Circuit in the case of *Cox* v. *Esso Shipping Company*, 247 F. 2d 629.

2. There is a conflict of authority between decision by the Court of Appeals for the Second Circuit in the case at bar, *Hidick* v. *Orion Shipping & Trading, etc., supra*, and *Nadar* v. *Isthmian S.S. Co., supra*, with the prior decision by the same Circuit in the case of *Sternberg Dredging Co.* v. *Moran-Towing & Transp. Co., Inc.*, 196 F. 2d 1002.

3. There has been a prejudicial preclusion and limitation of petitioner's most vital proof.

4. The Court having excluded the material and pertinent statements of the master and other officers of the vessel, it would seem that under such circumstances, it called for exercise by the Trial Judge of his right to call these officers as Court's witnesses, in accordance with the statement in the dissenting opinion in the case of *Johnson* v. *United States*, 68 S. Ct. 391, 333 U. S. 46,[2] by *Justice Frankfurter*.

---

[2] While a court room is not a laboratory for the scientific pursuit of truth, a trial judge is surely not confined to an account obviously fragmentary, of the circumstances of a happening, here the meagre testimony of Johnson, when he has at his command the means of exploring them fully, or at least more fully, before passing legal judgment. A trial is not a game of blind man's buff; and the trial judge need not blindfold himself by failing to call an available vital witness simply because the parties, for reasons of trial tactics, choose to withhold his testimony.

Federal judges are not referees at prizefights but functionaries of justice. See *Herron* v. *Southern Pac. Co.*, 283 U. S. 91, 95, 51 S. Ct. 383, 384, 75 L. Ed. 857; *Quercia* v. *United States*, 289 U. S. 466, 469, 53 S. Ct. 698, 699, 77 L. Ed. 1321. As such they have a duty of initiative to see that the issues are determined within the scope of the pleadings, not left to counsel's chosen argument. See *New York Cent. R. Co.* v. *Johnson*, 279 U. S. 310, 318, 49 S. Ct. 300, 73 L. Ed. 706. Just as a Federal judge may bring to his aid

(Continued on page 4)

5. A party who alone can discover truth should be charged with the burden of producing evidence. *United States* v. *Bull Steamship Line*, 146 F. Supp. 210.

6. There has been a radical departure from the complete uniformity of decisions—search for the truth is the controlling basis in passing upon admissibility of evidence.[3]

(Continued from page 3)

an auditor, without consent of the parties, to examine books and papers, hear testimony, clarify the issues, and submit a report, in order to "render possible an intelligent consideration of the case by court and jury", *Ex parte Peterson*, 253 U. S. 300, 306, 40 S. Ct. 543, 545, 64 L. Ed. 919, and in so doing has the power to tax the expense as costs "necessary to the true understanding of the cause on both sides," *Whipple* v. *Cumberland Cotton Co.*, Fed. Cas. No. 17,515, 3 Story 84, 86, he has the power to call and examine witnesses to elicit the truth. See *Glasser* v. *United States*, 315 U. S. 60, 82, 62 S. Ct. 457, 470, 86 L. Ed. 680. He surely has the duty to do so before resorting to guesswork in establishing liability for fault.

Dudder's account of what happened surely could supplement Johnson's as a basis for recreating the events which led to Johnson's injury. Neither party saw fit to use his available testimony. Instead of entering judgment for the party who had the burden of proof and did not meet it, the trial judge should at least have called Dudder as the Court's witness. As Judge Sibley observed in a case where witnesses who knew what actually happened had not been called to testify: "We think the interests of justice would be served by a new and more orderly trial, which can easily be managed * * *. Williams and Batson (the witnesses) certainly know the truth of the things in dispute. If neither party will risk calling a witness who knows important facts, it is in the power of the court to call and examine such a witness, in the interest of truth and justice, allowing both parties the right of cross-examination and impeachment." *Chalmette Petroleum Corporation* v. *Chalmette Oil Distributing Co.*, 5 Cir., 143 F. 2d 826, 828, 829.

[3] *Vicksburg & Meridian R. Co.* v. *Putnam*, 118 U. S. 545, 7 S. Ct. 1.

Reports made by the superintendent to the board of directors of a railroad.

(Continued on page 5)

7. The weight and probative factual value of statements has always been recognized as the province of a jury and should not now be taken from the jury and admitted or excluded as a matter of a Trial Court's discretion.

Statement

The action was commenced by the petitioner to recover damages for personal injuries against Orion Shipping and Trading Company as owner of the S.S. Seacoronet and against Pacific Carriers, Inc., operator and manager of such vessel.

The accident occurred August 17, 1953, on the said vessel while it was being loaded at the Port of Pusan, Korea, while the petitioner was a seaman aboard said vessel.

The summons and complaint were filed in the Clerk's Office of the United States District Court for the Southern District of New York December 23, 1954. Issue was joined on August 20, 1956. Respondent, Pacific Cargo Carriers

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(Continued from page 4)

Chicago, St. Paul, M. & O. Ry. Co. v. *Kulp*, 8 Cir., 102 F. 2d 352, cert. denied, 307 U. S. 636, 59 S. Ct. 1032.

Here, a statement, as well as a report of a conductor on a train concerning an accident, were admissible in evidence when made in the course of the railroad investigation of the accident.

Landgraf v. *United States*, D. C. Pa., 75 F. Supp. 58.

Reports and statements made in the regular course of business of respondent, and subpoenaed from respondent's files.

Callahan v. *Chicago B. & Q. Rd. Co.*, 47 Mont. 401, 133 P. 687, 47 L. R. A. N. S. 587.

Statements made by the conductor and trainmaster as to the cause of an accident, were admissible, when they were made to the railroad in the course of its investigation, as to the cause of the accident.

Corporation, filed a cross-complaint against the third-party defendant, United States of America on March 6, 1957. The third-party defendant filed its answer herein on May 23, 1958.

The case was specifically noticed for trial on the basis of the joinders of issue.

Jurisdiction in this case is based upon the Jones Act, 46 U.S.C.A. §688 and General Maritime Law.

Result of the Trial Below

The Court submitted the issues to the jury on a general verdict, and after the charge of the Court, the jury returned a verdict in favor of the respondents.

Upon rendition of the verdict, petitioner moved to set aside the verdict and for direction of the verdict, which motions were denied and proper exceptions taken.

During the course of the trial, the respondents agreed that the United States of America would pay Orion Shipping and Trading Co. Inc., and Pacific Cargo Carriers Corporation a certain portion of any judgment rendered in said action.

Thereafter, judgment was entered dismissing the complaint.

Facts

The facts of the case are sufficiently set forth in the charge of the Court to the jury, rendering unnecessary much other or further discussion of the evidence.

The charge states:

> "There are certain facts in this case concerning which there seems to be no dispute, namely, that plaintiff was working as a chief cook on the steam-

> ship Seacoronet, which was owned by defendant Orion Shipping and Trading Company and managed by Pacific Cargo Carriers; that on August 17, 1953, it was loading cargo into the hold of the vessel at the Port of Pusan, Korea." (28a)

The log of the vessel recites:

> "Chlorine gas cylinder in No. 5-4 lower hold commenced leaking gas covering the entire ship. All hands ordered off vessel subject to first aid station for treatment." (8a)

The charge further states, that petitioner claims that while the cargo was being loaded between 9 and 10 P.M. that evening, a certain chlorine gas container, which was not empty, was loaded on the ship, and that the container was either defective or damaged, permitting gas to escape and penetrate the various parts of the ship and that he inhaled some of the gas (28a).

The charge states the evidence:

> "However, there is no doubt that the plaintiff was on the ship at the time chlorine gas was escaping and that shortly thereafter the master ordered all of the crew ashore, no matter in what part of the ship they were located." (30a).

Petitioner testified upon direct examination that he was on the ship at the time the gas came out; that he did not know what kind of gas it was; that he was in the cabin when the gas came out; that he went to the tweendeck; that he smelled the gas when he got there; that it was all over the ship; that they rang the bell, the alarm for everybody to go off on shore (8a-9a).

He testified at length as to the damages that he sustained as a result of gas (R. 40 *et seq.*).

Upon cross-examination he stated that when it happened it smelled like ammonia and that was what woke him up;

that about 10 to 15 minutes later the alarm rang for everybody to go ashore (9a). That the smell woke him up and that it was all over the ship (9a); that it took him about 15 minutes to get ashore (10a); that the smell was strong like ammonia (10a); the men abandoned the ship, took an ambulance, all of the crew went ashore (10a); 8 or 10 men were taken with him in the ambulance to the dispensary or the first aid place in the Army hospital (10a).

At the outset of the case, counsel for petitioner moved for judgment on the pleadings (7a):

> "Mr. Rassner: Now I would like to make a motion for judgment on the pleadings as they now stand.
>
> We have alleged that the plaintiff suffered personal injury by reason of an escape of chlorine gas from one of the chlorine tanks or containers or wagons, as it was called at various times.
>
> In the third party complaint, as I read it, it is an admission by the defendant in our case that the chlorine gas did escape from the tank, and that the personnel aboard the vessel did come within the area of the effects of the chlorine gas and therefore I think we are entitled to a judgment.
>
> The Court: Is there an issue?
>
> Mr. Baillie: Yes, there is certainly an issue about the last statement, as to whether or not Hidick came into contact with any gas" (7a, 8a).

No useful purpose can be served by detailing the evidence of the petitioner that chlorine gas escaped in the ship, that he inhaled the same and that he suffered injuries as a result thereof.

The evidence is hardly disputed by respondents and no evidence was offered by respondents other than to minimize the claims of the injuries sustained by petitioner.

The Trial Court summarizes the evidence:

> "Of course, if plaintiff had pain and suffering immediately after the chlorine gas incident, and some

> disability resulting therefrom, even if not permanent in nature, he might be entitled to some recovery for that limited damage done to him." (36a)

The testimony of petitioner as to his inhalation of the gas, corroborated by the log of the ship and recognized by the charge of the Trial Court establishes the accident and that petitioner sustained some injury as a result thereof.

Argument.

There was no issue challenging the truth of petitioner's contention that the chlorine gas escaped.

The jury obviously disbelieved petitioner's contention that the chlorine gas came in contact with his person and caused him any pain, suffering or disability.

The introduction in evidence of the statements in question would have dispelled any doubt as to the truth of petitioner's testimony that he suffered at least some pain and disability from the aforesaid occurrence.

The statements were admissible as evidence and justified petitioner presenting his case on the assumption that the statements would be received in evidence, failing which the very foundation of his proof was destroyed.

In the case of *Sociedad de Transportes Mari* v. *Panama Canal Co.*, 163 F. Supp. 151, the Court stated at page 156:

> "The Court does not agree with proctors for the libelant but is of the opinion that the record, findings, and opinion of the Board is a record required by law to be kept and that it was made in the regular course of business and is in the nature of a public document and admissible in evidence as an exception to the hearsay rule. See The Abangarez, D. C., 60 F. 2d 543; see 28 U. S. C. sec. 1732; Wigmore on Evidence (3rd Edition) Vol. 5 sec. 1673 page 763."

Clearly, statements which are public documents or partake the nature thereof should not be excluded at the expense of truth and justice, nor should such documents be excluded on the basis that a Trial Court might feel that the substance of said documents is in evidence in some other form.

In *Sternberg Dredging Co. v. Moran Towing & Transportation Co. Inc.*, 196 F. 2d 1002, Chief Judge Learned Hand stated that a letter written by the master of a vessel, pursuant to the Code of Federal Regulations, should have been admitted in evidence as an official report, despite the fact that the signature was not authenticated.

No person living can state what impact, great or small, the exclusion of the statements had on the minds of the jury, particularly after the petitioner had predicated his case and opening statement on the fact that such proof would be submitted to the jury, nor how seriously the petitioner's rights were prejudiced.

The fact remains the petitioner opened and tried his case relying on the fact that admissible evidence would be properly admitted. Failure to permit such evidence, not only prevented petitioner from having the benefit thereof, but also to suffer psychological damage of an unknown and inestimable degree.

CONCLUSION

By reason of the foregoing, petitioner prays on behalf of himself and all seamen having need of the protection of our Courts, that this Honorable Court take under advisement the questions herein presented by granting the petition for a writ of certiorari.

Respectfully submitted,

RASSNER & RASSNER.
Attorneys for Petitioner.

APPENDIX

(Opinion of the United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 238, Docket 25700

(Argued March 9, 1960 Decided May 2, 1960)

—o—

MASSOAD ABDALLAH HIDICK,
Plaintiff-Appellant,

—v.—

ORION SHIPPING AND TRADING CO., INC., and PACIFIC CARGO CARRIERS CORPORATION,
Defendants-Appellees.

PACIFIC CARGO CARRIERS CORPORATION,
Third Party Plaintiff,

—v.—

UNITED STATES OF AMERICA,
Third Party Defendant.

—o—

Jacob Rassner, New York City (Thomas F. Frawley, New York City, of counsel), for plaintiff-appellant.

Healy, Baillie & Burke, New York City (Allan A. Baillie, Thomas L. Rohrer, New York City, on the brief), for defendants-appellees.

George Cochran Doub, Asst. Atty. Gen., S. Hazard Gillespie, Jr., U. S. Atty., New York City, Samuel D. Slade, Washington, D. C., Benjamin H. Berman, Robert D. Klages, Attys., Dept. of Justice, New York City, for Third Party Defendant.

Before CLARK, WATERMAN and LEWIS,* Circuit Judges.

PER CURIAM.

Appellant, a seaman, brought an action for personal injuries alleging that he became permanently disabled through the inhalation of chlorine gas that escaped from a container as appellant's ship was being loaded in the Port of Pusan, Korea, on March 23, 1953. Appellant's complaint contained both Jones Act (46 U. S. C. A. § 688) and unseaworthiness counts. Trial was had before Judge Dawson and a jury. The jury rendered a general verdict for defendants-appellees, and from the judgment entered thereon plaintiff appeals.

Appellant has briefed several claims of error. There is merit in none. At the close of the evidence plaintiff moved for a directed verdict in his favor as to liability. This was denied. After the adverse jury verdict plaintiff moved to set that verdict aside. This motion was also denied. There had been no dispute that the chlorine gas had escaped as alleged, but other issues relative to defendant's liability and the cause of plaintiff's injuries, if any, were factually contested. The motions were properly denied.

Other claims of error relate to the conduct of the trial. At the close of all the evidence plaintiff submitted to the court several requests to charge. In the form presented these requests were denied prior to delivery of the charge. Thereupon counsel specifically stated he took no exceptions save as to the failure of the court to grant his motion for a directed verdict. After the delivery of the charge, counsel, though specifically interrogated by the court with respect thereto, took no exceptions to the charge as delivered. The ship's log was admitted into evidence. It disclosed an entry that the leaking gas covered the entire vessel and that the crew were ordered ashore for treatment. In addition to the

* Of the Tenth Circuit, sitting by designation.

log, plaintiff's counsel also sought to introduce reports of the Master, officers of the ship, and investigators, with reference to the extent to which the chlorine gas permeated the vessel. These reports had been made available to plaintiff before trial. The persons making them were not present at trial. These reports were all excluded. Nothing in the excluded reports in any way contradicted the ship's log or contradicted the position defendant took at trial. In the posture of this case all these reports were but cumulative of the information contained in the log. All of the above claims are without merit.

Plaintiff's other contentions are based either upon an alleged "stipulation" made by defendant's counsel or upon statements made by the court during the progress of the trial. They are equally without merit.

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of May one thousand nine hundred and sixty.

Present:

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. DAVID T. LEWIS,
Circuit Judges

MASSOAD ABDALLAH HIDICK,
Plaintiff-Appellant,

v.

ORION SHIPPING & TRADING CO., INC., and
Pacific Cargo Cariers Corporation,
Third-Party Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the Third-Party-Defendant, United States of America.

A. DANIEL FUSARO
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 276

MASSOUD ABDALLAH HIRICK,

Petitioner,

—against—

ORION SHIPPING AND TRADING CO., INC., PACIFIC CARGO CARRIERS CORPORATION, and UNITED STATES OF AMERICA,

Respondents.

BRIEF FOR RESPONDENTS ORION SHIPPING AND TRADING CO., INC. AND PACIFIC CARGO CARRIERS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CASES CITED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 276

MASSOAD ABDALLAH HIDICK,

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—against—

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Respondents.

BRIEF FOR RESPONDENTS ORION SHIPPING AND TRADING CO., INC. AND PACIFIC CARGO CARRIERS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of the Case

Pursuant to the provisions of Rule 40, Section 3, respondents Orion Shipping & Trading Co., Inc., and Pacific Cargo Carriers Corporation will limit their statement of the case to correcting inaccuracies in the petitioner's statement of the questions presented. Petitioner's questions numbered "2", "3" and "4" are directed to the admissibility in evidence of testimony given at a Coast Guard investigation (Question 2); "written reports of the Coast Guard obtained from" ship's officers and ship's crew (Question 3); and Coast Guard records of an investigation of a marine disaster (Question 4).

At the trial of the action below there were no records or evidence introduced or sought to be introduced which might fit into such categories, save one. There was no Coast Guard investigation of the incident which gave rise to petitioner's alleged injuries and, therefore, no testimony before the Coast Guard and no records whatsoever prepared by the Coast Guard.

The one document which might be included under the three questions presented by petitioner was a copy of a "report of marine casualty" prepared by the master of the vessel on the pertinent Coast Guard form, the original of which was filed with the Coast Guard at an American port. This document, among others, was made available to petitioner's attorney as part of the pre-trial discovery proceedings without any stipulation being made as to its admissibility. At no time during the trial were any documents or records or even the original of the master's report on file with the Coast Guard, subpoenaed from the official records maintained by the Coast Guard.

In view of the foregoing, respondents will only concern themselves in the succeeding argument with petitioner's first question presented and with the exclusion of the "report to marine casualty".

As the above will indicate, the valid questions presented are already greatly circumscribed. The rules of evidence pertinent to the remaining issues do not raise substantial questions of law to which this Court should devote its valuable time. As the succeeding argument attempts to indicate there is no conflict between the decisions of the Circuit Courts; in fact, the decisions are consistent and in harmony with a developing rule of law.

ARGUMENT

I

Statements of a master and other officers taken by a shipowner do not constitute admissible evidence in a personal injury action unless proper grounds are presented for their admissibility.

Petitioner invalidly assumes as the basis of his argument that such statements were erroneously excluded by the trial court, that the statements were made in the "regular course of business". This Court has already ruled that statements of employees given to their employer in connection with an accident are not admissible as being made in the "regular course of business" within the purview of 28 U. S. C. §1732 (superseding 28 U. S. C. §695) unless it was the regular course of such business to make such a record. *Palmer* v. *Hoffman*, 318 U. S. 109 (1942).

In the *Palmer* case it was held that it was not the "regular course of business" of the Railroad there involved to take and record statements of its employees involved in accidents. The business of the railroad was to operate the railroad. Similarly, the taking of statements of its employees is not the regular business of the respondent shipowner here. Respondents' business is the ownership and operation of ocean-going vessels in world-wide trade.

Petitioner urged in his appeal to the United States Court of Appeals for the Second Circuit that the statements were admissible as "admissions against interest". The Court of Appeals properly held that where nothing in the excluded statements in any way contradicted the ship's log admitted in evidence or contradicted the position respondents took at trial, the exclusion of the statements was not erroneous.

There is no conflict between the decision below and the decision of the United States Court of Appeals for the Fifth Circuit in *Cox* v. *Esso Shipping Co.*, 247 F. 2d 629 (1957) as urged by petitioner as grounds for the granting of certiorari. Respondents urged the Court of Appeals below to follow the reasoning of the *Cox* decision. The Fifth Circuit had stated:

> "For an admission, rightly understood but so often confused, in its classic prototype is merely—but significantly—a position taken by the adversary, either personally or through an authorized agent, which is contrary to and inconsistent with the contention now being made in the litigation. It is that simple. It need not have been, and is so often said, an admission against interest, nor is there a need to lay a predicate for its use. All that is needed is an authoritative statement by the adversary inconsistent with the contemporary litigation position." 247 F. 2d 632.

In the *Cox* case, a master's "report of marine casualty" was admitted because it was properly held to be an admission against interest, the master having testified in person and having taken a contradictory position to that taken in the report.

Even assuming that the statements were admissible as admissions against interest, only the statement by the master of the vessel could bind the respondent shipowner as the admissions of an authorized agent. *The Patomac*, 5 Wall. 590 (1869); *Naylor, Adms.* v. *Isthmian S.S. Co.*, 187 F. 2d 538 (2d Cir., 1951). The master's statement made no reference to the petitioner or to any injuries sustained by the crew. It merely expanded the facts stated in the entry made in the ship's log, which log was admitted in evidence. As such, the master's statement was only cu-

lative and the Court of Appeals below so held. The admissibility of cumulative evidence must be left to the sound discretion of the trial judge. See *Lancaster v. Kane*, 327 U. S. 645 (1946).

II

The exclusion of the master's "report of marine casualty" by the trial court was not clearly erroneous nor has petitioner shown that he was prejudiced by the exclusion.

Where a "report of marine casualty" is filed with the U. S. Coast Guard pursuant to statutory regulations, it would appear to be the weight of authority that the report is properly admissible in evidence. *Sterbera Dredging Co. v. Moran Towing & Transp. Co.*, 196 F. 2d 1002, 2d Cir., 1952); *Cox v. Esso Shipping Co.*, supra. However, regardless of the basis for admissibility of the document, a proper foundation and identification of the document must be made. As stated by Judge Learned Hand in the *Sterbera* decision:

> "As for the authority, the letter was an official report, *produced from the custody of those to whom the law directed it to be delivered*.
>
> "On the new trial Beale may of course contradict the letter, but it will be admissible as such, *if it is produced by the Coast Guard*." 196 F. 2d 1004, 1005. (Emphasis supplied)

The exclusion of the report in question at the trial below was made on the ground that the document was not properly identified nor was its authenticity established since it was not produced by the Coast Guard. This is made clear

by the following portion of the colloquy taken from the trial transcript between the Court, Mr. Rassner, attorney for the plaintiff-petitioner, and Mr. Baillie, attorney for defendants-respondents Orion and Pacific:

"[450] Mr. Rassner: I do not intend to call any additional people as witnesses but I do want to offer in evidence certain documents.

May the record show that in lieu of an examination before trial of the defendant I have been furnished by Mr. Allan Baillie of the defense counsel certain records, including this paper, which I would like to have marked for identification.

(Marked Plaintiff's Exhibit 24 for identification)

Mr. Rassner: I submit to your Honor that Plaintiff's Exhibit 24 for identification is the master's report, the report of marine casualty or accident. I offer it in evidence. This is the report of the master furnished to me by defendant's counsel in lieu of an examination before trial. I offer it in evidence.

Mr. Baillie: May I see what it is?

The Court: Any objection?

Mr. Baillie: May I see what it is, your Honor?

(Handed to Mr. Baillie)

Mr. Baillie: Your Honor, in the first place, this is not a report made to the owners of the vessel.

The Court: Do you object?

Mr. Baillie: Yes, your Honor.

[451] The Court: In the absence of some proof of the circumstances under which this was made, I will sustain the objection.

Mr. Rassner: May I respectfully except, particularly in view of the fact that it was furnished in lieu of an examination—

The Court: I don't care—

Mr. Rassner: May I make the statement on the record?

The Court: I will take your statement as an unproved statement. I do not know anything about it. There is no stipulation on the record about it.

Mr. Rassner: Well, I just want to make my statement for the record. I do not intend this as an argument but I take exception to your Honor's ruling on the ground that this was furnished to plaintiff's counsel in lieu of an examination before trial of the defendant, and also on the ground that this is entitled to be received—

The Court: I make my ruling on this basis, that if this was an entry which was made in the regular course of business, like a ship's log or something like that, then without further proof we will take it, *but there is no background evidence as to what this is. This is a form with some words on it. I do not know anything* [452] *about it.* It may have been made out in the regular course of business, it may not, but in the absence of some proof as to how this happened to be in the ship, I will sustain the objection.

Mr. Rassner: And may I state my exception, the reasons for it on the record?

The Court: No, your objection means nothing except that you reserve a ground for appeal.

Mr. Rassner: Well, I reserve my ground for review of your Honor's ruling on that.

The Court: All right." (Emphasis supplied). (R., pp. 11a, 12a of Appendix of Plaintiff-Appellant in Court of Appeals below).

Had the proper foundation been laid for the introduction of the report and its authenticity established by its produc-

tion, by the Coast Guard, the trial court might still in its discretion have excluded the report as cumulative. Clearly, therefore, the trial court's ruling excluding the master's report was not clearly erroneous.

As stated in petitioner's brief on page 9, "the jury obviously disbelieved petitioner's contention that the chlorine gas came in contact with his person and caused him any pain, suffering or disability". Petitioner's argument, however, that the report if admitted in evidence would have changed the jury's verdict is without any logical or persuasive basis. As previously stated, the report did little more than corroborate the log entry. At no time did the respondents deny the basic facts of the occurrence.

Petitioner makes no attempt to indicate how he was prejudiced by the exclusion of the documents referred to, other than to state that "no living person" can know. This Court stated in *Palmer* v. *Hoffman*, *supra*:

> ". . . We cannot say that the ruling was prejudicial even if we assume it was erroneous. Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. [February 26, 1919] 40 Stat. 1181, c. 48, 28 USCA § 391. He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. That burden has not been maintained by petitioners." 318 U. S. 116.

Respondents here urge the applicability of the above stated rule as well as the adoption of the concluding sentence.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition herein is devoid of merit and should, therefore, be denied.

Respectfully submitted,

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No. 276

In the Supreme Court of the United States

OCTOBER TERM, 1960

MASSOAD ABDALLAH HIDICK, PETITIONER

v.

ORION SHIPPING AND TRADING CO., PACIFIC CARGO CARRIERS CORP., and UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

ALAN S. ROSENTHAL,
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OPINIONS BELOW

The District Court for the Southern District of New York filed no written opinion in entering judgments based on the jury's verdict for respondents (P. 5a).[1] The opinion of the Court of Appeals for the Second Circuit (Pet. App. 11-13), is reported at 278 F.2d 114.[2]

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[1] "P." refers to the appendix to petitioner's brief in the court below. "R." refers to the appendix to the Government's brief below.

[2] The District Court's opinion in support of its denial of the United States' motion to dismiss the third party claim, not involved here, is reported at 157 F. Supp. 477.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 1960 (Pet. App. 14). The petition for a writ of certiorari was filed on July 28, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, certain prior written statements of persons not present to testify were properly excluded from evidence.

STATEMENT

Petitioner brought this action against respondent Orion Shipping and Trading Co., Inc., owner of the S.S. SEACORONET, and respondent Pacific Cargo Carriers Corporation, operators of the vessel. The United States, time charterer of the vessel, was brought in as a third-party defendant. The gravamen of the petitioner's complaint was that, on August 17, 1953, chlorine gas escaped from a container being loaded aboard the vessel in Pusan, Korea, and that petitioner, a seaman aboard the vessel, inhaled the gas and was permanently injured.

At trial, respondents made no effort to contradict the fact that, as shown in the vessel's log (P. 8a), gas did escape in the ship on the day in question, requiring the evacuation of the crew. Instead, all of respondents' evidence tended to show that petitioner, whether or not he came in contact with the gas, suffered none of the injuries he claimed. Thus:

it was shown that petitioner walked off the vessel under his own power during the evacuation (R. 10a, 35a, 36a), and that medical examinations of petitioner two weeks and ten weeks after the accident showed no signs of exposure to the gas (R. 1a, 2a). Additionally, experts on the physiological effects of chlorine gas testified that, if no injuries are manifested shortly after a person comes in contact with the gas, ill-effects do not later develop (R. 97a, 119a, 122a). The jury returned a verdict for the respondents, and the district court entered judgments in their favor (P. 5a).

Petitioner appealed to the Court of Appeals for the Second Circuit, asserting, *inter alia*, that the district court erred in refusing to admit into evidence written statements, made available to the petitioner before trial, by the master and other officers of the vessel, whom petitioner did not call as witnesses (P. 11a-20a, 42a-52a). These statements made no reference to the petitioner or any injury suffered by him, but merely showed the fact—uncontested by respondents—that gas had escaped aboard the vessel, necessitating the evacuation of the crew (P. 42a-52a).

In affirming the judgment of the district court, the court of appeals held that the written statements were properly excluded, since "[T]he persons making them were not present at trial." Noting that nothing in the statements in any way contradicted the position of the respondents at trial, the court stated that the statements were "but cumulative of the information contained in the log" (Pet. App. 13).

ARGUMENT

The decision below is clearly correct, turns on the particular facts, and involves no conflict with other decisions. Further review is not warranted.

The exclusion of the written statements involved here is plainly correct under the hearsay rule, since the record contains no showing that the persons making the statements could not have been called as witnesses by petitioner, or that some special exception to the hearsay rule favored the admission of the statements. The correctness of the decision below is further supported by the fact that the statements were merely cumulative of what was already shown in the ship's log and uncontested by the respondents —that gas escaped aboard the S.S. SEACORONET, necessitating the evacuation of its crew. The admission of the statements, therefore, could not have affected the jury's verdict in the district court, which must have been based on a finding that, although gas did escape aboard the vessel, petitioner did not, as a result, suffer the injuries he claimed.

Petitioner asserts (Pet. 2-3) that the decision below is in conflict with *Cox* v. *Esso Shipping Co.*, 247 F.2d 629 (C.A. 5). In *Cox*, the court held that statements by the master of a vessel were admissible in evidence under the exception to the hearsay rule for prior inconsistent statements by a party or his agents. The court, however, expressly stated that the exception applied only to statements of a party which were "inconsistent with the contention now being made in litigation." 247 F.2d at 632. Here, of course, no

such inconsistency is present. Further, the case is not, as petitioner asserts (Pet. 3), in conflict with *Sternberg Dredging Co.* v. *Moran Towing & Transportation Co.*, 196 F.2d 1002, where certain statements made in the regular course of business were held admissible. The record is barren of any foundation showing that the statements offered were made in the regular course of business (see P. 11a-20a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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